APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JULY 30, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-15330
D.C. Docket No. 97-02163 CV-T-25B

JERRY LIVINGSTON, as Guardian of Roger Lee Livingston, ROGER LEE LIVINGSTON, individually,

Plaintiffs-Appellants,

versus

LAWRENCE W. CROW, JR., Sheriff of Polk County, in his official capacity, BRIAN WHIDDEN, et al.,

Defendants-Appellees.

No. 00-11699
D.C. Docket No. 97-02163 CV-T-25B

JERRY LIVINGSTON, as Guardian of Roger Lee Livingston,

Plaintiff-Appellee,

ROGER LEE LIVINGSTON, individually,

Plaintiff,

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versus

LAWRENCE W. CROW, JR., Sheriff of Polk County, in his official capacity, BRIAN WHIDDEN, et al.,

Defendants,

EDWARD OTTE,

Defendant-Appellant.

Appeals from the United States District Court for the Middle District of Florida

(July 30, 2001)

Before BLACK, and BARKETT, Circuit Judges, and TIDWELL*, District Judge.

BARKETT, Circuit Judge:

Jerry Livingston, as attorney-in-fact and Next Friend of Roger Lee Livingston, and Roger Lee Livingston, individually, (collectively "the Livingstons") appeal from judgment as a matter of law entered after a jury trial in favor of Lawrence W. Crow, Jr., Sheriff of Polk County, on their Eighth Amendment failure to train claim, brought pursuit to 42 U.S.C. § 1983, and their state law battery and negligence claims. The Livingstons also appeal the district court's grant

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* Honorable G. Ernest Tidwell, U.S. District Judge for the Northern District of Georgia, sitting by designation.

of qualified immunity to Edward Otte on their § 1983 Fourteenth Amendment excessive force claim. Otte cross-appeals the district court's denial of his motion for judgment as a matter of law on the Livingstons' state-law battery claim and the district court's denial of his motion to amend the judgment to set off the amount the Livingstons received from a pre-trial settlement with a codefendant. We affirm in part and reverse and remand in part.

BACKGROUND

The facts viewed in the light most favorable to the Livingstons are as follows. In January 1996, Roger Livingston, a mentally handicapped adult, was admitted to The Meadows Convalescent Center. Approximately two months later, Roger wandered away from the Meadows and into a department store. While in the store, Roger followed and attempted to grab a customer. The store manager summoned the police who arrested Roger and transported him to the Polk County Jail.

Upon arrival at the jail, Roger refused to exit the back seat of the patrol car. In order to remove Roger from the car, Corrections Officer Bennie Hawley sprayed him with a chemical agent. Roger exited the car, was booked, and placed in a cell. Roger continually beat on the door of the cell and, in an attempt to quiet him down, Corrections Officer Brian Whidden sprayed Roger with a chemical agent.

The next morning, Corrections Officers Mark Ivankovich and Edward Otte were on duty. Otte, Ivankovich's superior, told Ivankovich that he wanted to transfer Roger from an

observation cell to a holding cage. Otte then ordered Ivankovich to open Roger's cell door and told Roger to stand away from the door. In response, Roger yelled "No, no, never. Country western, play country western." Otte then sprayed Roger with a chemical agent. At that point, Otte and Ivankovich grabbed Roger to take him down to the floor. During this maneuver, Roger's arm shook free from Ivankovich's grasp for a moment, however, Otte and Ivankovich were able to quickly put Roger on his hands and knees. Roger was not hostile or attacking the officers and was on his hands and knees when, according to Ivankovich's trial testimony, "the next thing I know, Otte just knee spiked him twice in the abdomen area . . . . [Roger] was just on his hands and knees. I mean, I don't think he was resisting that much." In his deposition, which was introduced at trial, Ivankovich stated that when Otte administered the knee strikes Roger was "looking up and just yelling. He wasn't really [struggling] — he was just on his hands and knees and yelling still." Moreover Roger testified via videotape deposition, which was admitted at trial, that after his arrival and booking at the jail he did not fight back with any of the officers. As a result of this incident, Roger was hospitalized and diagnosed with two fractured ribs, a fractured hand, post-traumatic stress disorder and post-concussion syndrome.

The Livingstons then filed this suit naming Sheriff Crow, in his official capacity, Otte, and the Meadows as defendants.[1]

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1. At the close of discovery, Otte moved for summary judgment based upon qualified immunity. The district court denied Otte's motion noting that there was a factual dispute as to whether Roger was resisting when Otte administered the knee strikes. Otte appealed this ruling and we dismissed for lack of appellate jurisdiction.

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Prior to trial, the Livingstons reached a settlement with the Meadows. During the jury trial both Crow and Otte moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. The district court granted the Rule 50 motion as to the failure to train claim and the state battery and negligence claims against Crow and the excessive force claim against Otte on qualified immunity, allowing only the state battery claim against Otte to proceed to the jury. The jury returned a verdict against Otte, specifically finding that Otte acted in bad faith and the district court entered judgment in favor of the Livingstons. Otte then filed a motion to amend the judgment to reflect a setoff in the amount of the settlement the Livingstons received from the Meadows which was denied. This appeal followed.

We review the entry of judgment as a matter of law *de novo*, applying the same legal standard as the district court. *See S.E.C. v. Adler*, 137 F.3d 1325, 1340 (11th Cir. 1998). "[A] court should render judgment as a matter of law when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.' " *Reeves v. Sanderson Plumbing Prod., Inc.*, __ U.S. __, 120 S. Ct. 2109 (2000) (quoting Fed. R. Civ. P. 50). The district court's denial of Otte's post-trial motion is reviewed for abuse of discretion. *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898, 906 (11th Cir. 1998).

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DISCUSSION

1. *Claims against Crow*

The Livingstons brought three claims against Crow in his official capacity: (1) a § 1983 claim alleging an Eighth Amendment violation based upon Crow's failure to train his subordinates; (2) a state law battery claim by which the Livingstons attempt to hold Crow, in his official capacity, liable for the actions of Otte; and (3) a state law negligence claim by which the Livingstons attempt to hold Crow, in his official capacity, liable for the actions of Whidden and Hawley when they sprayed Roger with the chemical agent. The district court entered judgment in favor of Crow on each of these claims and the Livingstons appeal these rulings. We consider each in turn.

a. § 1983 Failure to Train

In *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), the Supreme Court held that although there is no *respondeat superior* liability under § 1983, a plaintiff may prevail on a § 1983 claim against a municipality if the violation of his rights was caused by the "execution of a government's custom or policy, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy . . . ." *Id.* at 691-92. An allegation of a failure to train can be the basis for municipal liability under § 1983 only where (1) the municipality inadequately trains its employees, (2) this failure to train is a city policy, and (3) that city policy causes the employees to violate a citizen's constitutional rights. *See City of Canton,*

Ohio v. Harris, 489 U.S. 378, 387-91 (1989). The district court granted judgment to Crow on this claim finding that the Livingstons had failed to produce evidence of causation. Upon review of the record and consideration of the arguments of the parties, we cannot say that the district court erred in reaching this conclusion.

b. State Law Battery and Negligence Claims against Crow

Unlike § 1983, which does not recognize the principle of *respondeat superior* liability, Florida Statutes § 768.28 provides that the state of Florida — or a public official in his official capacity — may be held liable for the acts of its employees or agents "under circumstances in which the state or agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state." Fla. Stat. § 768.28(1). However, in order to fall within the purview of this statute, a plaintiff must "serve [process] upon the head of the agency concerned and also . . . upon the Department of Insurance. . . ." Fla. Stat. § 768.27(7). Failure to comply with this service requirement mandates judgment in favor of the state defendant. *See Miami-Dade County v. Meyers*, 734 So. 2d 507 (Fla. Dist. Ct. App. 1999). Here, the Livingstons did not serve process on the Department before they had rested their case and the district court entered judgment in favor of Crow due to this failure. On appeal, the Livingstons argue that this was error because Crow waived any objection to service of process by failing to raise it in his motion to dismiss. *See Lemonik v. Metro. Dade County*, 672 So. 2d 899 (Fla. Dist. Ct. App. 1996) (holding that the defense of failure to comply with § 768.27(7) may be waived).

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Federal Rule of Civil Procedure 12(g) provides that "[i]f a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based upon the defense or objection omitted." Rule 12(h) further states that "[a] defense of . . . insufficiency or process, or insufficiency of service of process is waived if . . . omitted from a motion in the circumstances described in subsection (g) . . . ." Here, Crow filed a motion to dismiss arguing that the complaint failed to state a claim, however, Crow did not challenge the Livingstons' failure to serve the Department of Insurance. Thus, under Rule 12(g) and (h), Crow waived any defense based upon this insufficiency of the service and could not assert it as a basis for his Rule 50 motion.

In response, Crow first argues that Rule 12(g) — which states that a defendant waives any defense "available" at the tune of the filing of a motion to dismiss — does not apply here because the defense of failure to comply with § 768.28(7) was not "available" to him when he filed his motion to dismiss. He makes this unique argument suggesting that in order for a defense to be considered "available" under Rule 12(g), the defense must necessarily result in dismissal of the action. Here, because the plaintiff has until he has rested his case at trial to serve the Department,[1] Crow argues

1. Under Florida law, where the Department of Insurance is a third-party to the suit, as here, a Plaintiff has up and until he rests his case-in-chief to serve process upon the Department. *Lemonik*, 672 So. 2d at 900 ("Service of process upon the Department as a nonparty, although statutorily mandated, however, is not a precondition to the (Cont'd)

that the defense was not "available" until then. First, although a motion to dismiss based upon failure to comply with § 768.28(7) might simply have resulted in the service being effectuated upon the Department, it does not follow that the defense was not "available" to Crow. Indeed, many arguments raised in a Rule 12(b) motion do not compel the dismissal of the claim, but rather simply give the parties notice of any defect in their case and provide a fair opportunity to remedy them. For example, we have held that it is error to dismiss a case with prejudice for failure to state a claim without first granting the plaintiff an opportunity to amend their complaint, see *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991), however that does not mean that a defense for failure to state a claim is not available to defendants. Moreover, Crow's argument is severely undercut by the fact that he asserted non-compliance with § 768.28 in his answer and affirmative defenses. If the defense was available when filing an answer, it was available at the motion to dismiss. Crow also argues Rule 12(h)'s waiver provision does not apply because any defense based upon non-compliance with § 768.28(7) is not a defense based upon insufficiency of service of process. It is clear, however, from the text of the statute that a defense based upon § 768.28(7) is based upon insufficiency of service. Thus, because Crow waived any defense based upon non-compliance with § 768.28(7), the district court erred in granting judgment to Crow on both the battery and negligence claims for failure to serve the Department of Insurance.

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maintenance of a tort action against a governmental agency. Indeed, the legislature did not prescribe any time frame whatsoever in section 768.28(7) for a plaintiff to effectuate service upon the Department when the Department is not otherwise a party to the action.") (internal citations omitted).

We nonetheless affirm the judgment for Crow on the battery claim because the jury found that Otte acted in bad faith. Florida Statutes § 768.28(9)(a) provides that Florida's general waiver of immunity does not apply to acts (1) beyond the scope of their duties, (2) committed in bad faith or with malicious purpose, or (3) that exhibit wanton and wilful disregard of human rights, safety, or property. Thus, judgment in favor of Crow is mandated on the state battery claim because sovereign immunity bars the claim.

For the foregoing reasons we reverse the judgment as a matter of law for Crow on the negligence claim, but affirm the judgment as a matter of law in Crow's favor on the battery claim and the § 1983 failure to train claims.

2. *Claims against Otte*

The Livingstons brought two claims against Otte: (1) a § 1983 Fourteenth Amendment excessive force claim; and (2) a state law battery claim. The district court granted qualified immunity to Otte on the § 1983 claim and denied Otte's motion for judgment as a matter of law on the battery claim. Additionally, the district court denied Otte's motion to alter or amend the judgment on the battery claim. The Livingstons appeal the district court's grant of qualified immunity and Otte appeals the denial of his motions. We consider each claim in turn.

a. § 1983 Excessive Force Claim

"A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so,

proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (internal quotations omitted). Thus, we address initially the question of whether Otte's actions violated Roger Livingston's constitutional rights.

Pretrial detainees may bring § 1983 actions to redress violations of their rights under the Due Process Clause of the Fourteenth Amendment, which "protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989). In order to determine if an application of force violates the Constitution, we consider "(1) the need for the application of force, (2) the relationship between the need and the amount of force used, (3) the extent of the injury inflicted and, (4) whether the force was applied in good faith or maliciously and sadistically." *Moore v. Gwinnett County*, 967 F.2d 1495, 1498 (11th Cir. 1992).

Here, the evidence, viewed in the light most favorable to the Livingstons, was that, aware that Roger was a mentally ill individual, Otte entered his cell, sprayed him with a chemical agent and, when Roger was on his hands and knees, administered two knee strikes to Roger's chest area, resulting in fractured ribs. Although Roger was screaming "Play country western" when Otte entered the cell, he was not resisting when Otte knee spiked him in the ribs.[2] Based upon

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2. The district court based its grant of judgment to Otte on this claim upon its determination that Roger was resisting when Otte administered the knee spikes. Although there was evidence at trial to

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these facts, we conclude that Otte's use of force was excessive and violated Roger's Fourteenth Amendment rights. Having determined that Otte's actions violated Roger's rights, we also determine, based upon the same facts, that qualified immunity does not protect Otte from civil liability.

In an excessive force case, a plaintiff can overcome the defense of qualified immunity by "showing that the official's conduct lies so obviously at the very core of what the [Constitution] . . . prohibits that the unlawfulness of the conduct was readily apparent to the official." *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997). In addition to whether the detainee is resisting the officer, we also consider "(1) the need for the application of force, (2) the relationship between the need and the amount of force used, (3) the extent of the injury inflicted and, (4) whether the force was applied in good faith or maliciously and sadistically." *Moore*, 967 F.2d at 1498.

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support this conclusion, there was also evidence that Roger was *not* resisting during the incident. For example, there was testimony that when Otte administered the knee strikes Roger was "looking up and just yelling. He wasn't really [struggling] — he was just on his hands and knees and yelling still." Further, Roger testified via videotape deposition, which was admitted at trial, that after his arrival and booking at the jail he did not fight back with any of the officers. Accordingly, there was a material issue of fact as to whether Roger was resisting. In ruling on a Rule 50 motion, the court must resolve all factual disputes in favor of the non-moving party. Thus, the district court erred in determining that Roger was resisting when Otte administered the knee strikes.

Here, the evidence, viewed in the light most favorable to the Livingstons, was that there was no need for the application of the force employed. Indeed, there was testimony from both plaintiff and defense experts that the proper course of action would have been for Otte never to have entered the cell. Moreover, the testimony was that Roger was on his hands and knees offering no resistance when Otte administered the knee strikes. The evidence also demonstrated that the amount of force used was disproportionate to the force required under the circumstances. Ivankovich testified at trial that when Otte administered the knee strikes to the ribs, Roger "was on the floor just yelling and screaming," and that "I don't think he was resisting that much." As noted above, Ivankovich's deposition testimony, in which he stated that Roger was just "looking up and yelling" when Otte administered the knee strikes, was also admitted, as was Roger's own deposition testimony in which he stated that he did not fight back against any of the officers after he had been booked at the jail. Moreover, Otte eviscerated any argument that the use of force was proportional when he administered the second unnecessary knee strike to Roger's ribs. The evidence also supported the conclusion that as a result of the knee strikes, Roger sustained a serious and painful injury — fractured ribs. Finally, the evidence was, as the jury found, that Otte applied the knee strikes in bad faith for malicious or sadistic reasons.[3] Based upon the

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3. Some circuits have held that such a finding, standing alone, is sufficient to deny qualified immunity. *See Frazell v. Flanigan*, 102 F.3d 877, 886-87 (7th Cir. 1996) ("once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for

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foregoing, we conclude that application of the excessive force standard would lead every reasonable officer to conclude that Otte's conduct was unlawful, and thus we conclude that the district court erred in granting qualified immunity to Otte.

b. State Law Battery Claim

Otte argues that because the alleged conduct occurred while he was on the job, at the place of his employment, and was an exercise of his lawful duties, his use of force against Roger Livingston was "within the scope of his employment" and, under Florida law, he cannot be held personally liable for it.

Florida Statutes § 768.28(1) provides that Florida waives sovereign immunity and is liable for the negligent or wrongful act or omission of any employee of the state while acting within the scope of office or employment. However, Florida Statutes § 768.28(9)(a) provides that this waiver does not apply to and that governmental employees are personally liable for, acts (1) beyond the scope of their duties, (2) committed in bad faith or with malicious purpose, or (3) that exhibit wanton and wilful disregard of human rights, safety, or property.

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immunity purposes whether a reasonable officer could have believed that his conduct was lawful"); *see also Katz v. United States*, 194 F.3d 962 (9th Cir. 1999), cert. granted under the name *Saucier v. Katz*, __ U.S. __, 121 S.Ct. 480 (2000); *Scott v. District of Columbia*, 101 F.3d 748, 759 (D.C. Cir. 1996); *Street v. Parham*, 929 F.2d 537, 540, 541 n. 2 (10th Cir. 1991); *Holt v. Ards*, 843 F.2d 242, 246 (6th Cir. 1988).

In *McGhee v. Volusia County*, 679 So. 2d 729, 733 (Fla. 1996), the Florida Supreme Court noted that in an excessive force/battery case there is often an issue of fact as to whether the defendant or the State is liable for the actions, and held that "the fact that [the defendant] . . . may have intentionally abused his office does not in itself shield the [State] from liability." In order to resolve this issue of fact, "the question must be put to the fact-finder whether [the deputy] . . . acted in bad faith, with malicious purpose, or in a manner exhibiting wanton or wilful disregard of human rights, safety, or property." *Id.* Here, the district court did just that, and the jury found that Otte acted in bad faith. Although there is some evidence supporting Otte's contention that he did not act in bad faith, we cannot say that the jury's finding is without support. Therefore, the district court did not err in denying Otte's motion for judgment as a matter of law.

c. Motion to Alter or Amend Judgment

Otte finally argues that the district court abused its discretion in denying his post-trial motion to alter or amend the judgment because: (1) the manifest weight of the evidence did not support the damages awarded by the jury; (2) the jury was unduly influenced by evidence relating to the claims against Sheriff Crow; and (3) the final judgment did not reflect a set off for those amounts the Livingstons received in a pre-trial settlement for their claims against the Meadows. Of these arguments, only the third warrants discussion.

Florida Statutes § 768.041 allows a defendant to set off the amount of a judgment against him when a plaintiff has settled with a joint tortfeasor. A set off is inappropriate when

a plaintiff has separate claims against each defendant. *See Lauth v. Olsten Home Healthcare, Inc.*, 678 So. 2d 447, 448 (Fla. Dist. Ct. App. 1996). "A separate and distinct claim is one that involves different elements of damages." *Id.* at 448.

Here, the Livingstons brought claims against the Meadows for violations of Florida Statutes § 400.428 — the nursing home resident's bill of rights. Although the claim against the Meadows sought recovery for damages Roger sustained when he "wandered away" from the Meadows and was arrested at the department store, the complaint also sought damages for: (1) failure to provide adequate and appropriate health care; (2) failure to provide sufficient therapeutic and rehabilitative services; (3) failure to properly assess Roger's condition; (4) failure to properly develop a resident care plan; and (5) failure to notify the family of changes in Roger's condition. Accordingly, the Livingstons brought separate claims against Otte and the Meadows, and the district court did not abuse its discretion in denying Otte's motion.

CONCLUSION

For all of the foregoing reasons, the rulings of the district court are affirmed in part and reversed and remanded in part. We affirm the district court's grant of judgment as a matter of law to Crow on the § 1983 claim, its grant of judgment to Crow on the battery claim, its denial of Otte's motion for judgment as a matter of law on the battery claim, and its denial of Otte's motion to amend judgment. We reverse and remand the district court's grant of judgment as a matter of

law to Crow on the negligence claim, and the grant of qualified immunity to Otte on the § 1983 excessive force claim.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART

BLACK, Circuit Judge, specially concurring:

I concur in the result.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED NOVEMBER 18, 1999 AND FILED NOVEMBER 19, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 97-2163-CIV-T-25B

JERRY LIVINGSTON, et al.

Plaintiffs,

v.

LAWRENCE CROW, et al.,

Defendants.

ORDER

This cause is before the Court on the Defendants' motion made pursuant to Fed. R. Civ. P. 50. Upon consideration, the Court finds as follows:

Defendants have moved, pursuant to Rule 50, for judgment as a matter of law on four grounds: (1) Plaintiffs have not proven their claim under 42 U.S.C. § 1983 ("§ 1983") against defendant Edward Otte ("Otte") because Otte is entitled to qualified immunity for his actions which allegedly violated Plaintiff Roger Livingston's ("Livingston") constitutional rights and Otte's actions did not constitute

excessive force; (2) Plaintiffs have not proven their § 1983 claim against defendant Sheriff Lawrence Crow ("Sheriff") because Plaintiffs have not established a causal link between the Sheriff's alleged failure to adequately train or establish policy regarding the handling of mentally disabled persons and Plaintiffs' injuries and Plaintiffs have failed to establish deliberate indifference by the Sheriff in failing to provide adequate psychiatric and medical care to Livingston; (3) Plaintiffs have failed to establish a state law battery claim against Otte because they have not proven that Otte's actions were willful, wanton, or malicious; and (4) Plaintiffs cannot sustain their state law claims against the Sheriff because they have failed to comply with the requirements of Fla. Stat. §768.28(7).

"[I]n considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party." *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 554 (1990) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986)). The court should grant a motion for judgment as a matter of law only if it finds that reasonable people exercising impartial judgment could not arrive at a contrary verdict, and the court may not weigh the evidence or decide the credibility of the witnesses. *Berman v. Orkin Exterminating Co., Inc.*, 160 F.3d 697, 701 (11th Cir. 1998). "To survive a motion for judgment as a matter of law, the nonmoving party must provide more than a scintilla of evidence that there is a substantial conflict in evidence to support a jury question." *Id.* (internal quotations omitted and footnote omitted).

Appendix B

1. Qualified Immunity of Otte

Qualified immunity is an affirmative defense available to government officials being sued in their individual capacities. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate the clearly established statutory or constitutional rights of which a reasonable person should have known." *Id.* at 813; *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In resolving the issue of qualified immunity, the Court must first determine "whether the legal norms allegedly violated the defendant were clearly established at the time of the challenged actions." *Mitchell v Forsyth*, 472 U.S. 511, 528 (1985). The defendant must have been aware of more than just an abstract right; rather, the case law in factual terms must set out a "bright line" to establish that his conduct violated that right. *See Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997) (quoting *Kelley v. Curtis*, 21 F.3d 1544, 1550 (11th Cir. 1994)). The qualified immunity defense also embodies an "objective reasonableness" standard — that is, the official's actions must have been "so obviously illegal in the light of then-existing law that only an official who was incompetent or who knowingly was violating the law would have committed them." *GJR Investments v. County of Escambia, Fla.*, 132 F.3d 1359, 1366 (11th Cir. 1998).

Defendants assert that Plaintiffs have failed to establish that the actions of Otte violated any clearly established, then-existing law. Plaintiff's claim that a factual issue exists

regarding the actual circumstances surrounding Otte's actions and thus, judgment as a matter of law in favor of Otte on the issue of qualified immunity is inappropriate. Plaintiffs further assert that a sheriff's deputy and at least one expert testified that Otte used excessive force against Livingston.

Plaintiffs' arguments fall short. First, although the Court recognizes that it must view the facts in the light most favorable to Plaintiffs, the facts clearly establish that after Otte executed the take down maneuver on Livingston and at the time Otte administered the knee strikes to Livingston, Livingston continued to move, resist, or struggle against Otte. Even Plaintiffs' expert, professor James White, testified that he believed Livingston continued to resist Otte after the take down. The only evidence that indicates otherwise is the testimony of former sheriffs deputy Mark Ivankovich ("Ivankovich"). Ivankovich testified that Livingston "was just on his hands and knees and yelling." However, throughout the remainder of his testimony Ivankovich testified that he didn't think that Livingston "was resisting that much," that Livingston "was trying to push up a little," and that Livingston "was struggling." Additionally, the report made by Ivankovich shortly after the incident stated that Livingston was still resisting when he was on the ground and Ivankovich stated the same thing during his deposition. Thus, taken as a whole, Ivankovich's testimony does not indicate that Livingston was completely non-resistant at the time Otte administered the knee strikes. Consequently, contrary to Plaintiffs' assertions, no question of fact exists as to whether or not Livingston continued to struggle after the take down by Otte.

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Given the fact that Livingston continued to struggle against Otte after the take down, Plaintiffs have not presented to the Court nor can the Court find any clearly established, then-existing law that Otte violated by administering the knee strikes to Livingston. If Otte did not violate clearly established case law he is entitled to qualified immunity. Therefore, Defendants' motion for judgment as a matter of law on the § 1983 claim against Otte is granted.

2. §1983 Claim Against the Sheriff

Plaintiffs' § 1983 claim against the Sheriff has two bases: (1) a failure to adequately train Sheriff's employees regarding the handling of mentally disabled persons and (2) a failure to provide adequate medical and psychiatric care to Livingston. Defendants move for judgment as a matter of law because, according to Defendants, Plaintiffs have not established a causal link between the Sheriff's alleged failure to adequately train or establish policy regarding the handling of mentally disabled persons and Plaintiffs' injuries and because Plaintiffs have failed to establish deliberate indifference by the Sheriff in failing to provide adequate psychiatric and medical care to Livingston.

a. Failure to Adequately Train

Plaintiffs allege that the Sheriff failed to adequately train his employees in handling mentally disabled people and as a result Livingston suffered injuries while in the custody of the Sheriff. The evidence showed that Sheriff's deputies received training in the handling of mentally disabled people while at the academy. Plaintiffs did not challenge the

adequacy of this training. In fact, Plaintiffs' expert testified that the training received at the academy by Otte was a "standard well prepared training format." Plaintiffs, instead, challenge the fact that the Sheriff failed to provide continuing training to his employees on the handling of mentally disabled persons. Plaintiffs' expert testified that the Sheriff should have provided ongoing training. Plaintiffs' expert further testified that the standard cycle for such continuing training is four years..

The evidence showed that Otte had received his training at the academy approximately two years prior to the incident at issue. Therefore, even if the Sheriff had provided continuing training to his employees, as recommended by Plaintiffs' expert, Otte might not have been required to take the training. Further, none of Plaintiffs' witnesses explained what type of additional training would have prevented the incident at issue or how the training, or lack thereof, received by Otte caused the incident.

In order to establish liability under § 1983 for inadequacy of police training, the alleged failure to train must amount "to deliberate indifference to the rights of persons with whom the police come into contact." *Gold v City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998). Furthermore, a "municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.' " *Id.* Plaintiffs have failed to meet their burden. Plaintiffs have failed to establish that the Sheriff's policy of relying on the training his employees received at the academy and not providing continuing training regarding the handling of mentally disabled persons constitutes deliberate indifference

to the rights of persons. Plaintiffs have also failed to establish that the Sheriff's failure to train Otte was the moving force behind Otte's actions. Without this causal link between the Sheriff's policies and the Plaintiffs' injuries, the Sheriff cannot be held liable under § 1983. Consequently, Defendants' motion for judgment as a matter of law on Plaintiffs' § 1983 claim against the Sheriff for failure to train must be granted.

b. Failure to Provide Adequate Medical and Psychiatric Care

In order to establish a § 1983 claim against the Sheriff for failure to provide adequate medical care, Plaintiffs must establish "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Adams v. Poag*, 61 F.3d 1537, 1543 (11th Cir. 1995) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). To constitute deliberate indifference the complained of actions must rise to a level beyond mere negligence, inadvertence, or error in good faith. *Id. See also Estelle v. Gamble*, 429 U.S. at 106; *Howell v. Evans*, 922 F.2d 712, 719 (11th Cir. 1991). Thus, Plaintiffs must demonstrate that the Sheriff exhibited a reckless disregard for Livingston's medical and psychiatric well being.

Plaintiffs have failed to present evidence that establishes that the Sheriff's office acted with deliberate indifference toward Livingston in administering medical and psychiatric treatment. The testimony establishes that Livingston was examined twice by a nurse after being taken into custody and before Otte entered Livingston's cell. The evidence also establishes that employees of the Sheriff observed Livingston in his cell on a regular basis. Plaintiffs have not produced

any evidence that the medical care Livingston received from the nurse varied from contemporary medical standards or that any care was deliberately withheld from Livingston. Having failed to establish either of these things, Plaintiffs have failed to establish that the Sheriff acted with deliberate indifference in providing, or failing to provide, Livingston with medical and psychiatric care. Consequently, Defendants' motion for judgment as a matter of law as to the §1983 claim against the Sheriff for failure to provide adequate medical and psychiatric care should be granted.

3. Battery Claim Against Otte

Defendants move for judgment as a matter of law on Plaintiffs' battery claim against Otte individually. Defendants argue that in order to find Otte individually liable §768.28(9)(a) requires Otte's actions to have been "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." Fla. Stat. §768.28(9)(a). Defendants assert that Plaintiffs have not presented any facts that would establish that Otte's actions were done in bad faith, were malicious or willful and wanton. Plaintiffs argue that whether Otte's actions were done in bad faith, were malicious, or were willful and wanton is a question of fact for the jury to determine.

The Court agrees with Plaintiffs. Based on the evidence presented the Court finds that a reasonable person could find that Otte's actions were done in bad faith, were malicious, or were willful and wanton. Consequently, Defendants' motion for judgment as a matter of law on the battery claim against Otte individually is denied.

Appendix B

4. State Law Claims Against the Sheriff

Defendants move to dismiss Plaintiffs' state law claims against the Sheriff for failure to comply with §768.28(7), Fla. Stat. Section 768.28, Fla. Stat., waives the state's sovereign immunity and allows a person to sue the state under certain conditions. Subsection 7 of the statute states:

> In actions brought pursuant to this section, process shall be served upon the head of the agency concerned and also, except as to a defendant municipality or the Spaceport Florida Authority, upon the Department of Insurance; and the department or the agency concerned shall have 30 days within which to plead thereto.

Fla. Stat. §768.28(7). Defendants assert that Plaintiffs have failed to serve process upon the Department of Insurance as required by the statute. Plaintiffs have offered no evidence to demonstrate that they complied with this section of the statute prior to resting their case. The evidence offered by Plaintiffs establishes service of process on the Department of Insurance only after Plaintiffs rested at trial.

Florida case law indicates that although compliance with §768.28(7) can be waived, the defense of failure to comply with the service requirements is not waived if the defendant raises it in defendant's responsive motion or answer to the complaint. *Lemonik v. Metropolitan Dade County*, 672 So.2d 899, 900 (Fla. Ct. App. 1996). Plaintiffs oppose Defendants' motion and cite to several cases. However, the cases relied upon by Plaintiffs are not on point. The cases cited by Plaintiff

discuss the time frame in which the Department of Insurance must be served. The cases do not address the issue of failure to serve the Department of Insurance.

In this case Defendants raised the failure to comply with §768.28 in their answer and as an affirmative defense. Although Plaintiffs could have cured their failure to serve the Department of Insurance at any time prior to resting their case, they failed to do so. Consequently, the Court finds that Plaintiffs failed to comply with Fla. Stat. §768.28(7) and thus Defendants are entitled to judgment as a matter of law on all state law claims against the Sheriff.

Accordingly, it is

ORDERED:

Defendants' motion for judgment as a matter of law is **GRANTED in part and DENIED in part**:

a. Defendants' motion as to the §1983 claim against Otte is **GRANTED**;

b. Defendants' motion as to the §1983 claims against the Sheriff is **GRANTED**;

c. Defendants' motion as to the state law battery claim against Otte is **DENIED**;

d. Defendants' motion as to the state law claims against the Sheriff is **GRANTED**.

Appendix B

DONE AND ORDERED at Tampa, Florida this 18th day of November, 1999.

s/ Henry Lee Adams, Jr.
HENRY LEE ADAMS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AND FILED NOVEMBER 23, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 97-2163-CIV-T-25B

JERRY LIVINGSTON, as Attorney in Fact and Next Friend of ROGER LEE LIVINGSTON, and ROGER LEE LIVINGSTON, individually,

Plaintiffs,

VS.

EDWARD OTTE,

Defendant.

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the court for trial by jury. The issues have been tried and the jury has rendered its verdict.

* * *

IT IS ORDERED AND ADJUDGED that judgment is hereby entered on behalf of the Plaintiffs, JERRY LIVINGSTON, as Attorney in Fact and Next Friend of

Appendix C

ROGER LEE LIVINGSTON, and ROGER LEE LIVINGSTON, individually, and against the Defendant, EDWARD OTTE, in the amount of $896,132.00, for which sum let execution issue.

November 23, 1999 **SHERYL L. LOESCH, CLERK**

s/ Anne H. Ohle
(By) Deputy Clerk

APPENDIX D — VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED NOVEMBER 12, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 97-2163-CIV-T-25B

JERRY LIVINGSTON, as Attorney in Fact and Next Friend of ROGER LEE LIVINGSTON, and ROGER LEE LIVINGSTON, individually,

Plaintiffs,

v.

EDWARD OTTE,

Defendant.

VERDICT

We, the Jury, return the following verdict:

1. Did EDWARD OTTE commit a battery which was a legal cause of injury to ROGER LEE LIVINGSTON?

Yes ✓ No ____

If your answer to question 1 is yes, please answer question 2.

If your answer to question 1 is no, your verdict is for Defendant EDWARD OTTE and you should proceed no further other than to date and sign this form.

Appendix D

2. In committing a battery upon ROGER LEE LIVINGSTON, did EDWARD OTTE act in bad faith or with malicious purpose or in a manner exhibiting wanton and wilful disregard for human rights or safety.

Yes ✓ No ____

If your answer to question 2 is yes, please answer questions 3 and 4.

If your answer to question 2 is no, your verdict is for Defendant EDWARD OTTE and you should proceed no further other than to date and sign this form.

3. What is the amount of any damages sustained by ROGER LEE LIVINGSTON for medical expenses, Health care and/or nursing care?

In the past: $146,132

In the future: $650,000

4. What is the amount of any damages sustained by ROGER LEE LIVINGSTON for pain and suffering, disability, physical impairment, mental anguish, inconvenience, aggravation of a disease or physical defect or loss of capacity for the enjoyment of life?

In the past: $50,000

In the future: $50,000

SO SAY WE ALL this 12th day of November, 1999, at Tampa, Hillsborough County, Florida.

s/ Leonard J. Vernon
FOREPERSON

APPENDIX E — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 12, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-15330-GG

JERRY LIVINGSTON, as Guardian of Roger Lee Livingston, ROGER LEE LIVINGSTON, individually,

Plaintiffs-Appellants,

versus

LAWRENCE W. CROW, JR., Sheriff, of Polk County, in his official capacity, BRIAN WHIDDEN, EDWARD OTTE, BENNIE HAWLEY,

Defendants-Appellees.

No. 99-11699-GG

JERRY LIVINGSTON, as Guardian of Roger Lee Livingston,

Plaintiff-Appellee,

ROGER LEE LIVINGSTON, individually,

Plaintiff,

Appendix E

versus

LAWRENCE W. CROW, JR., Sheriff of Polk County, in his official capacity, BRIAN WHIDDEN, BENNIE HAWLEY,

Defendants,

EDWARD OTTE,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

BEFORE: BLACK, and BARKETT, Circuit Judges, and TIDWELL*, District Judge.

PER CURIAM:

The petition for rehearing filed by Appellant, Edward Otte is DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

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* Honorable G. Ernest Tidwell, U.S. District Judge for the Northern District of Georgia, sitting by designation.